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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA,
SAN FRANCISCO DIVISION

SUCCESSFACTORS, INC., a Delaware corporation,

Plaintiff,

v.

SOFTSCAPE, INC., a Delaware corporation; and DOES 1-10, inclusive,

Defendants.

Case No. CV 08 1376 EDL

**EX PARTE APPLICATION FOR
EXPEDITED DISCOVERY; AND
MEMORANDUM OF POINTS
AUTHORITIES IN SUPPORT THEREOF**

INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 26(d), 30(a), and 34, Plaintiff SuccessFactors, Inc. ("SuccessFactors") hereby moves the Court for an order of relief from the presumptive statutory stay of formal discovery prior to the initial Rule 26(f) conference to allow

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NORTHERN DISTRICT OF CALIFORNIA

1 SuccessFactors to immediately serve its first set of discovery requests on defendant Softscape,
2 Inc. ("Softscape"), take a Rule 30(b)(6) deposition of Softscape, and serve subpoenas on two
3 third-party Internet service providers, such discovery to be completed within seven days of service
4 of this order.

5 SuccessFactors brings this motion concurrently with its *ex parte* application for a
6 temporary restraining order ("TRO") and motion for preliminary injunction, on grounds that it
7 will otherwise be irreparably harmed by Softscape's continued use or dissemination of a
8 document containing false, misleading and scandalous misinformation about SuccessFactors, and
9 which has been circulated under SuccessFactors' trademark. As described more fully in the
10 concurrent TRO application, Softscape created a 43-page presentation entitled
11 "SUCCESSFACTORS Workforce Performance Management: The Naked Truth" (the
12 "Presentation"), which was then e-mailed to at least twenty-five of SuccessFactors' prospective or
13 actual customers. While the initial evidence demonstrates that the Presentation originated from
14 Softscape, SuccessFactors urgently seeks additional evidence regarding Softscape's acts and
15 decisions regarding the creation and dissemination of the Presentation to support its preliminary
16 injunction application. Expedited and targeted initial discovery is necessary to provide the Court
17 with a more developed record for the resolution of SuccessFactors' motion for a preliminary
18 injunction.

19 SuccessFactors' limited document requests and deposition topics, attached as **Exhibit A**
20 and **Exhibit C** to the Declaration of Liwen A. Mah in Support of Plaintiff's Motion for Expedited
21 Discovery ("Mah Decl."), will adduce specific evidence probative of Softscape's infringement of
22 SuccessFactors' trademarks, Softscape's unauthorized access to Successfactors' computer system
23 in violation of 18 U.S.C § 1030 and Softscape's false advertising in violation of Section
24 43(a)(1)(B) of the federal Lanham Act, 15 U.S.C. § 1125(a). Accordingly, SuccessFactors
25 respectfully requests that this Court grant its motion for an order permitting: (1) fifteen document
26 requests with responses and documents by Plaintiff due within five business days of service of the
27 Court's order; (2) a Rule 30(b)(6) oral deposition of Softscape to be initiated with seven business
28 days of the order; and (3) leave to subpoena third-party Internet service providers Verizon

Internet Services, Inc. and Comcast Cable Communications, Inc. for documents concerning the use of IP addresses that have been tied to the Presentation or its dissemination

ARGUMENT

I. IN LIGHT OF THE INJUNCTIVE RELIEF THAT SUCCESSFACTORS SEEKS, GOOD CAUSE EXISTS FOR EXPEDITED DISCOVERY.

A. This Court Has Authority to Order Expedited Discovery for Good Cause.

Federal Rules of Civil Procedure 26(d), 30(a), and 34(b) authorize the Court to shorten the timing requirements of Rule 26(d) in order to serve discovery requests and take depositions on an expedited basis. Courts in the Ninth Circuit apply a flexible “good cause” standard to determine whether expedited discovery is warranted. *Semitoil v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 274-75 (N.D. Cal. 2002) (expedited discovery granted on showing of good cause). “Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.” *Id.* at 276. Expedited discovery is proper where it may ultimately conserve the resources of the parties and the court by expediting the litigation. *Id.* No showing of irreparable harm is necessary. *Id.*

In particular, courts recognize that expedited discovery is necessary and proper where, as here, a plaintiff seeks development of a full evidentiary record to support a motion for a preliminary injunction. *See e.g., Pod-Ners, LLC v. Northern Feed & Bean*, 204 F.R.D. 675, 676 (D. Colo. 2002) (granting a motion for expedited discovery and requiring defendants to respond within 11 days of service); *Nabisco, Inc. v. PF Brands, Inc.*, 50 F. Supp. 2d 188, 194 (S.D. N.Y. 1999), *aff’d*, 191 F.3d 208 (2d Cir. N.Y. 1999), (ordering expedited discovery on preliminary injunction). “Expedited discovery is particularly appropriate when a plaintiff seeks injunctive relief because of the expedited nature of injunctive proceedings.” *Ellsworth Assocs. v. United States*, 917 F. Supp. 841, 844 (D.D.C. 1996); *see also Sports Design and Development v. Schoeneboom*, 871 F. Supp. 1158, 1167 (N.D. Iowa 1995) (granting temporary restraining order and expedited discovery in a Lanham Act action because plaintiff “will need expedited discovery . . . to prepare for the preliminary injunction hearing”).

B. In light of the injunctive relief that SuccessFactors seeks, good cause exists for expedited discovery.

Here, the nature of the relief and evidence sought constitutes good cause for expedited, focused discovery, especially since any possible prejudice to Softscape would be slight from merely accelerating discovery that must ultimately occur.

As other courts have found in the context of preliminary injunctions, expedited discovery is appropriate to enable SuccessFactors to obtain evidence regarding its probable success on the merits. Although SuccessFactors has been able to analyze the Presentation and logs of Softscape's access to SuccessFactors' servers to deduce Softscape's involvement (*see* Declaration of Jim Matheson in Support of Plaintiff's Motion For a Temporary Restraining Order and Order To Show Cause Re Preliminary Injunction ("Matheson Decl.") ¶¶ 5-18), full information and many probative documents lie exclusively in the custody, control, or possession of Softscape. For instance, only Softscape would have complete information about

- how and when its employees or agents authored the Presentation;
- how and when its employees or agents accessed SuccessFactors' computers and data to develop the Presentation;
- any purported factual support for the content of the Presentation, including any communications from purported former employees of SuccessFactors; and
- the extent to which it has impermissibly used SuccessFactors' trademarks in additional documents besides the Presentation.

Further, although SuccessFactors knows that the Presentation has caused harm with respect to certain prospective customers, only Softscape is likely to have complete information about who received the Presentation and the motivation and strategy for Softscape's use of the Presentation unlawfully to compete with SuccessFactors. Without access to that evidence, Plaintiff and the Court would have incomplete information about Softscape's false advertising, trademark infringement, unfair competition, fabrication of the Presentation, the full extent of dissemination to the public, and the resulting irreparable harm.

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1 Providing access to that evidence would impose comparatively little inconvenience on
2 Softscape compared to the devastating harm that continued circulation of the false Presentation can
3 cause in the marketplace. Documents and testimony gathered in preparation for the hearing on
4 SuccessFactors' motion for a preliminary injunction overlap the documents and testimony that
5 Softscape would have to produce anyway during the course of this litigation. SuccessFactors'
6 claims revolve around one focused set of facts regarding the false factual basis for the Presentation,
7 its authorship and preparation, its distribution within Softscape and to the public, and
8 communications about the same. This level of inquiry is certainly justified by the virulent and
9 viciously false content of the Presentation and its immediate and serious impact in the marketplace.

10 Furthermore, the overwhelming majority of documents requested—such as computer files,
11 computer access logs, and e-mails—are likely to be in readily accessible in electronic form, so it
12 should not be difficult for Softscape to produce such documents quickly in their existing
13 electronic format. For example, an IP address (68.236.68.19) and user identification (Dennis
14 Martinek) identified from SuccessFactors' server logs and databases suggests that Softscape may
15 have obtained several images within the Presentation by use of one computer, and it would be
16 easy to copy and produce the data from that computer.¹ Because the relevant documents may only
17 be available in electronic form and could “easily be erased and manipulated,” there is especially
18 good cause for expedited discovery. *See Physicians Interactive v. Lathian Sys.*, 2003 U.S. Dist.
19 LEXIS 22868, at *10, *29-*30 (E.D. Va. 2003) (granting motion for expedited production of
20 electronic data, including identification and “mirror image” of defendant's computer equipment
21 that interacted with the plaintiff's computer servers).

22 In addition, at its heart, the preliminary injunction motion is about one document: the
23 Presentation, which limits the burden on Softscape to prepare for an oral deposition. Presumably a
24 small number of individuals participated in the creation, revision, or dissemination of that
25

26
27 ¹ To address concerns that Softscape's computers may contain sensitive data that could turn
28 out to be extraneous, SuccessFactors would be willing to stipulate to an appropriately worded
protective order.

1 Presentation, so even with an expedited schedule, Softscape should be able to easily prepare its
2 representatives for the Rule 30(b)(6) deposition.

3 Since this expedited discovery would be a great aid to the Court in deciding Plaintiff's
4 motion for preliminary injunction, would protect important evidence from being lost, and
5 outweighs the minimal prejudice to Softscape, there is good cause to allow expedited discovery.
6 *See Semitool v. Tokyo Electron Am., Inc.*, 208 F.R.D at 276.

7 **C. In light of the injunctive relief that SuccessFactors seeks, good cause also**
8 **exists for expedited subpoenas.**

9 Good cause also exists to expedite two subpoenas to third-party Internet service providers,
10 Verizon Internet Services, Inc. and Comcast Cable Communications, Inc. SuccessFactors has
11 identified and linked IP addresses 68.236.68.19 and 24.34.56.79 and 98.216.168.122 to the
12 authorship of the Presentation and to access to SuccessFactors' password protected files. *See*
13 Matheson Decl. ¶¶ 5-18. These IP addresses are associated with the Internet service providers
14 listed above and are both located in Massachusetts, near Softscape's headquarters. *See* Mah Decl.,
15 **Exhibit B**. A focused set of document requests, *see id.*, **Exhibit C**, is likely to produce evidence
16 about who used these IP addresses to access information that appears in the Presentation and
17 evidence about how the Presentation was disseminated. It is critical to obtain this information in
18 an expedited manner, as Internet service providers may not retain records regarding IP address
19 usage very long.

20 Because of the modest number of IP addresses and limited time period of interest, the
21 burden on the third parties should be slight, especially since the documents and records sought are
22 likely in easily accessible electronic form. Without this expedited discovery, critical evidence
23 may be lost, and SuccessFactors and the Court might accordingly be unable to ascertain the full
24 scope of Softscape's false advertising and unauthorized access to SuccessFactors' computers.

1 **II. THE LIMITED DISCOVERY IS FOCUSED ON ISSUES DIRECTLY RELATED**
2 **TO CLAIMS ASSERTED IN PLAINTIFF'S TRO APPLICATION AND MOTION**
3 **FOR PRELIMINARY INJUNCTION.**

4 In applying the "good cause" standard under Rule 26(d), courts can consider the scope of
5 the requested discovery. *See In re Gannett Satellite Information Network, Inc.*, 1997 U.S. Dist.
6 LEXIS 19600 (D. Mass. 1997) (granting a motion for "particularized" expedited discovery). As
7 shown in **Exhibit A** and **Exhibit C** to the Mah Declaration, SuccessFactors has carefully tailored
8 its initial discovery requests to the issues pertinent to the injunctive relief it seeks. Namely,
9 SuccessFactors' Document Requests and Deposition Topics all pertain to Softscape's trademark
10 infringement, false advertising, or unauthorized access to SuccessFactors' computer systems. For
11 example, Deposition Topics One through Seven and Document Requests One through Seven
12 pertain directly to the Presentation, its purpose, and falsity. Deposition Topics Eight through
13 Twelve and Document Requests Seven through Fourteen pertain to how Softscape may have
14 obtained information about SuccessFactors, created false information, made that false information
15 public, and accessed SuccessFactors' computers without authorization. Deposition Topics Five
16 through Ten and Document Requests Five through Twelve are likely to produce evidence
17 probative of Softscape's interference with SuccessFactors' actual or prospective customer
18 relationships and the resulting irreparable harm. The last Deposition Topic and last Document
19 Request pertain to how Softscape obtained and used SuccessFactors' trademarks, such as the
20 SuccessFactors logo that prominently appears on every page of the Presentation.

21 Where possible, SuccessFactors has narrowed its requests to specific, individual persons,
22 customers, or computers that it has identified as being most likely to be helpful in resolving the
23 issues in this case. Furthermore, SuccessFactors has minimized the burden on Softscape by
24 limiting its requests for documents and things to cover only January 2007 and later.

25 Accordingly, SuccessFactors' discovery requests strike a careful balance between the need
26 to develop a thorough record for the Court to decide the motion for preliminary injunction and a
27 desire to allow Softscape to respond to the requests in an expedient but complete manner without
28 prejudice or undue burden.

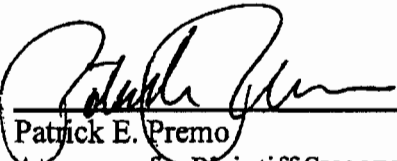
CONCLUSION

The discovery sought is limited and crafted to address issues relevant to Plaintiff's motion for preliminary injunction. It seeks information that is in others' possession and control, that is not available from another source, and that is necessary for the Court's adjudication. For the foregoing reasons, SuccessFactors respectfully requests that this Court grant its motion for expedited discovery.

Dated: March 11, 2008

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By:



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